IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

R. A. AITON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 4357

Brief of Defendant in Error

Geo. T. Wilson,
Assistant United States Attorney,
For Defendant in Error.

Filed this.....day of February, 1925.

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Clerk, U. S. Circuit Court of Appeals.

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BRIEF OF DEFENDANT IN ERROR

STATEMENT

Before presenting our argument on the various assignments of error, we desire to correct one or two slight misstatements appearing in the, "Statement of the Case", in the Brief of Plaintiff in Error.

In the first place, this case does not involve a violation of Section 1 of the Harrison Act, (Brief of plaintiff in error, page 1). But the plain allega-

tions of the indictment indicate clearly a violation of Section 2, and the record in the case, or as much thereof as is before this Court, will so establish.

It will be noted that the evidence has not been preserved in the record and is not before this Court. Hence, we cannot agree with the statement made by plaintiff in error, that:

"The record discloses the fact that numerous errors were committed by the trial court in the admission of incompetent and illegal evidence of a highly prejudicial nature, offered by the Government, and in the rejection of competent, legal evidence, offered by the defendant, tending to show good faith in the issuance of the prescriptions in question, and the lack of any criminal intent, although no specific intent to violate the law need be shown in this class of cases". (Brief of plaintiff in error, page 4.)

Certainly no presumption can arise from the omission of the evidence, other than, that the trial court followed the law, and that the court's rulings on the admissibility of evidence are correct. In fact, we fail to see how this Court can consider at all those assignments of error which are predicated upon the rulings of the court admitting or rejecting evidence during the progress of the trial.

We do not deem it necessary to argue each assignment by itself, in as much as there appears to be considerable repetition, and relation of the ques-

tions involved, among the various assignments. Therefore, in presenting our argument, we have grouped those assignments, which, although differently worded, present practically the same question.

ARGUMENT

ASSIGNMENTS I, II, III, IV.

These four assignments question the legality of the methods employed by the Government agents to obtain possession of the so-called prescriptions, and the correctness of the court's ruling admitting the prescriptions in evidence.

From the Motion to Suppress Evidence filed by plaintiff in error, and his affidavit attached thereto, (T. of R., page 18, 20), it appears that the prescriptions in question—nearly a thousand in number, written over a period of approximately six months, and all for narcotic drugs—were all filled at one drug store and in the possession of the druggist in his store at the time of their seizure. The narcotic officers, without warrant, took the prescriptions from the possession of the druggist in his store at about the time the plaintiff in error was arrested. Later, and at the trial, the prescriptions so seized were offered and received in evidence.

These facts and circumstances, plaintiff in error contends, constitute a violation of his constitutional guarantee of security in his person and effects against unreasonable search and seizure. And in support of his position, he cites Silverthorne Lumber Company v. United States, 251 U. S., 385, (Brief of plaintiff in error, page 18). The facts in the two cases are totally dissimilar. In the case cited, the search was of the office of the lumber company, and the articles seized were the company's private books, papers and documents in its possession.

In the instant case, however, there was no invasion of any premises owned, controlled or occupied in any manner by plaintiff in error. The prescriptions seized, although written by him, were the property, and in the possession, of the druggist. If any person had grounds for objection to the seizure, it was the latter, and not one who was a stranger to the premises invaded.

Chicco et al v. United States, 284 Fed. 434, 436, (C. C. A. 4th Circuit).

In addition to these facts, the prescriptions seized were not strictly personal or private effects within the meaning of the constitutional provision invoked by the plaintiff in error. They were, in the light of the established law, in the nature of quasi-public records, subject to inspection in the hands of the druggist at all seasonable hours by the agents of the Government. Article 124 of the Treasury De-

partment Regulations No. 35, issued by the Treasury Department, dated November 24, 1919, and signed by Daniel C. Roper, Commissioner of Internal Revenue, and approved by Carter Glass, Secretary of the Treasury, provides:

"Dealers who fill prescriptions are required to keep them in a separate file for a period of two years in such manner as to be readily accessible to inspection by investigating officers".

See, United States v. Mulligan, 268 Fed. 893, 895, (D. C., N. D., New York), and the cases cited therein.

In view of the circumstances surrounding the seizure of the prescriptions, their quasi-public nature, and the decisions of our courts on the question, we seriously contend that the trial court did not err in denying the Motion to Suppress and in admitting the prescriptions in evidence.

ASSIGNMENTS V, VI.

In these assignments, the Court is given to understand that the Government attempted to prove its case by the introduction in evidence of prescriptions written by plaintiff in error after his indictment by the Grand Jury. This is clearly a perversion of the facts. The record pertaining to this matter is this, the plaintiff in error was arrested on a Com-

missioner's warrant about February 28, 1922, and immediately admitted to bail, and that about May 1, 1922, he was indicted. During the interval of about two months which elapsed between the date of his arrest and the finding of the indictment, he wrote several hundred more prescriptions, and these prescriptions are the ones referred to in Assignments of Error V and VI.

We do not conceive how this Court can consider these two assignments in the present state of the record, in as much as the error, if any exists, can be disclosed only by a transcript of the evidence. In the absence of that, we do not believe this Court can safely say that this evidence, standing alone and unrelated to the other evidence, was inadmissible.

It is a familiar rule of criminal law, "That, if intent or motive be one of the elements of the crime charged, evidence of other like conduct by the defendant at or near the time charged is admissible." On this theory, it was held in Dysart v. United States, 270 Fed. 77, 79, (C. C. A. 5th Circuit), and again in Harris v. United States, 273 Fed. 785, 791, (C. C. A. 2d Circuit), that when a physician is charged with selling narcotic drugs by prescription, proof of numerous other prescriptions written by defendant is admissible to show intent.

But the Bill of Exceptions indicates (T. of R., page 60, Exception 1), that the court admitted the prescriptions in question to rebut the evidence,

given by plaintiff in error in his effort apparently to establish his good faith, that upon his arrest and the knowledge thus imparted that he was violating the law, he immediately desisted from writing further prescriptions.

The Harrison Act and the regulations made pursuant thereto provide that every physician shall keep a record of narcotics dispensed by him subject to inspection by the Federal officers. If the distribution of the drug is made by the physician from his office supply, the record thereof is kept by him, but if dispensed by prescription, the record (prescription) is retained by the druggist. (Article 124, Regulation 35, of the Treasury Department.) In either event, it is a record of the drugs sold and distributed by the physician or his order.

The question then presented by these two assignments of error is, can this record be adduced against the physician in rebuttal to his own testimony? In Sims v. United States, 268 Fed. 234, 236, the Circuit Court of Appeals for the Eighth Circuit decided this question in the affirmative. Said the court in that case:

"The final assignment as to the admission of evidence is that Sims, on cross-examination, was required to exhibit the record of his disposition of narcotics. This was the record required by law to be kept. Whatever the weight of this testimony, its competency is clear on the issues both of good

faith and of the character of business conducted by Sims."

From this authority, and the quasi-public nature of the record required by law to be kept, it seems that the entire records of a physician pertaining to his distribution of narcotics is admissible against him by way of rebuttal to his testimony.

ASSIGNMENT VII.

This assignment and the exception noted in the Bill of Exceptions (T. of R., page 60, Exception 2) are apparently too frivolous to admit of an answering argument. The question involved is one of those this Court is asked to pass upon in the absence of the evidence, but which can be correctly determined only after reviewing the evidence which led to the question. It is not suggested in either the assignment, or the Bill of Exceptions, that the question so asked by the trial judge was not relevant and material and therefore improper. Suffice to say, we know of no rule of law that precludes a judge from propounding a question to a witness during the course of a trial.

ASSIGNMENTS VIII, IX, XI.

These assignments are in the same category with others which depend for their correct determination

upon the other evidence in the case. However that may be, we are fully convinced that, in view of the language of the offer as made by plaintiff in error during his trial, and the authorities on the question, the trial court did not err in rejecting this offer.

Was the offer as shown by the Bill of Exceptions (T. of R., pages 61, 62, 63, Exceptions 3, 4, 6) sufficient to render it admissible, even on the theory that it tended to establish the good faith of the plaintiff in error, or that it, in any way, constituted a defense?

Did the offer include a showing that all of the prescriptions, and particularly those mentioned in the indictment, were written pursuant to the so-called clinic? Reading from Exception 6 as contained in the Bill of Exceptions, (T. of R., page 62), we find: "Defendant offered to show that many of the prescriptions introduced in evidence by the Government were written by the defendant under and pursuant to a clinic created by certain parties for the purpose of guarding and guaranteeing the lawful use of narcotic drugs administered to those suffering from chronic or incurable disease."

Did the offer include a showing that all of the forty or fifty drug addicts receiving their supply of drug from plaintiff in error, and particularly those mentioned in the indictment, were put under

his care by the clinic? We find from an inspection of the Bill of Exceptions (T. of R., page 61, Exception 3), that: "They concluded that the known addicts should be referred to one doctor and kept under his care and treatment."

Did the offer include a showing that the plaintiff in error had been designated as the one doctor to administer to the drug addicts receiving treatment from the so-called clinic? If so, the Bill of Exceptions is silent on that point.

In short, the offer fell far short of showing any evidence that was really material or relevant to the issues of the case, or that in any manner constituted a defense. But it is insisted that had the court admitted the evidence thus offered by plaintiff in error, his good faith would have been established. There are many respectable authorities to the effect that the good faith of the accused is one of the issues involved in this class of cases. And this doctrine has been generally recognized and followed. However, by a very recent pronouncement of the Supreme Court of the United States it seems this defense is not available to the accused.

United States v. Balint et al, 258 U. S. 250, 252, 254. Speaking through Mr. Chief Justice Taft in that case, the Court said:

"It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due

process of law. But that objection is considered and overruled in Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se. —Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."

In view of the failure of plaintiff in error to include in his offer, evidence material and relevant to the issues of the case, we respectfully submit that no error was committed by the court below in rejecting the so-called offer.

ASSIGNMENT X.

In considering this assignment, we are again confronted by a deficient record.

Can it be shown in the absence of the evidence,

that there was any evidence introduced during the trial of the case as a foundation for the requested instruction? But admitting that there was sufficient evidence to justify an instruction of this kind, can it be shown, in the absence of the complete charge, that the jury in this case were not instructed substantially as requested by plaintiff in error. It is too elementary to admit of argument that unless the complete charge is in the record, the court will not reverse a case because of an apparent error in giving or failing to give a particular instruction.

ASSIGNMENTS XII, XIII.

In the absence of the evidence, it is not apparent on what grounds the court excluded the evidence mentioned in these assignments. For that reason, we again offer our objection heretofore noted, namely, that with only a portion of the record before the court, a proper determination of the questions involved in these two assignments cannot be had.

However, we do not wish to be understood as admitting there is any merit in these assignments.

From our examination of the Bill of Exceptions, (T. of R., page 62, Exception 5), it is apparent the plaintiff in error proposed to show that the prescriptions after being filled were inspected by a

narcotic agent and his approval or O. K. endorsed thereon. This evidence he contends would have established his good faith in issuing the prescriptions in the first instance. We fail to understand how anything done by a narcotic agent after the commission of the offense would, in any manner, change the circumstances under which the prescriptions were written and delivered to the addicts.

In Thompson v. United States, 258 Fed. 196, 202, (C. C. A. 8th Circuit), a letter written to the defendant by the Commissioner of Internal Revenue was offered in evidence by the defendant on the grounds it tended to establish his good faith. The court held that the letter had been properly excluded.

ASSIGNMENT XIV.

The wording of this assignment and of the Bill of Exceptions do not agree as to the exact ruling of the trial court. (T. of R., page 63, Exception 7). In the Bill of Exceptions, it will be noted that the trial court announced "—that the rulings laid down by the Supreme Court of the United States in the case of United States v. Webb and the United States v. Jin Fuey Moy would be applied in this trial—".

In other words, the trial court merely said that the law as it was interpreted, would be applied to the trial of the instant case.

This, we submit, is what every court should do.

ASSIGNMENT XV.

We again challenge the accuracy of the wording of the assignment. Nowhere does the record disclose, other than in the assignment of error itself, that the court ever found that the witness, George Warner, had perjured himself. If the court had so found, we feel safe in saying that this case would not now be here, but that a new trial would have been promptly granted in the District Court.

It is true, plaintiff in error had attached to his Motion for New Trial what purported to be an affidavit of the witness, George Warner, admitting his perjury. (T. of R., page 30). It is true also, that shortly after executing the affidavit attached to the Motion for New Trial, he signed another affidavit in the presence of witnesses denying that he had sworn to the first affidavit and denying that certain matters contained in his first affidavit were true. (T. of R., page 37). If the entire record of this particular portion of the proceedings had in the court below was before this Court, a different light entirely would be shed upon this incident.

As the prosecuting officers in this case, we desire to say that the conviction of defendant in error was not obtained through perjured evidence, or even questionable evidence. The question presented by this assignment, however, will be decided by this Court strictly on the law applicable thereto, and to that end we cite the Court to a similar case in,

Glenberg v. United States, 281 Fed. 816, 817.

We note in the brief of plaintiff in error that he asks this Court to consider the Motion in Arrest of Judgment. The motion is based on the ground that the Act approved December 17, 1914, and commonly known as the Harrison Act, has been repealed.

The original act of 1914 was amended by the Revenue Act of 1918, approved February 24, 1919. (Sections 1006, 1007, 1008, Title X, 40 Statutes at Large, pages 1130, 1131, 1132). However, the amendment affected only Sections 1, 6 and a portion of Section 12 of the original act leaving intact Section 2, which is the portion of the statute under which the indictment is brought. By the provisions of Title XIV of the Revenue Act of 1921, approved November 23, 1921, the above amendments to the Harrison Act contained in the Revenue Act of 1918 were repealed. (Revenue Act 1921, Title XIV, 42 Statutes at Large, pages 320, 321). This repeal, however, did not affect the provisions of Section 2 of the Harrison Act. Hence, the Motion In Arrest of Judgment was properly denied.

We direct this court's attention to the fact that the sufficiency of the indictment in the case at bar has not been challenged by any of the assignments of error in the record. Likewise, the insufficiency of the indictment was not assigned as one of the grounds in either the Motion for New Trial or Mo-

tion in Arrest of Judgment. Suddenly, however, we are confronted by an extensive argument against the sufficiency of the indictment presented in the brief under an assignment of error to which it bears not the slightest relation.

Even though the insufficiency of the indictment was not properly assigned as error, we are fully aware that by a recent enactment of Congress amending our judicial code, and the rules of this Court, this matter may be properly considered by the Court at this time.

But, be that as it may, we submit that the indictment in this case meets all the requirements of a good pleading, that its plain allegations charge a crime within the language of the statute, that plaintiff in error could not have been misled to his prejudice in preparing and offering his defense and that the matters charged in this indictment could be safely pleaded in bar of another prosecution.

In closing, we respectfully urge upon this Court that substantial justice has been done and that the judgment of conviction of the District Court should be affirmed.

Respectfully submitted,

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For Defendant in Error.